1968

# Reliance National Life Insurance Company v. James E. Caine, Dba Caine Agency : Respondent's Petition For Rehearing And Brief In Support Thereof

# In the Supreme Court of the State of Utah

RELIANCE NATIONAL LIFE INSURANCE COMPANY,
*Plaintiff and Respondent,*

vs.

JAMES E. CAINE, dba Caine Agency,
*Defendant and Appellant.*

Case No. 10940

## RESPONDENT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

The Petitioner respectfully requests a rehearing in the above entitled cause and that the decision be modified as hereinafter suggested, for the reasons and upon the grounds following:

1. The decision of this Court to reverse the decision of the trial court is based upon grounds not argued by either party and upon which Respondent has had no opportunity to be heard.

2. That the decision of this Court and the concurring opinion of Chief Justice Crockett reversing the judgment of the trial court are based, in part, upon a misunderstanding of the record.

3. That the decision of this Court and the concurring opinion of Chief Justice Crockett places the blame upon the Respondent for the long delay in submitting findings and judgment to the trial court, which blame appears to have influenced the majority decision. The record does not support placing this blame upon the Respondent.

WHEREFORE, Petitioner respectfully submits that a rehearing should be had and the decision revised, believing that a re-examination of the record will assist the court better to understand the record certified, and will result in a revision and reversal of the decision herein.

Respectfully submitted,
MOFFAT, IVERSON AND TAYLOR

By .....
J. Grant Iverson
Attorneys for Petitioner

# BRIEF IN SUPPORT OF PETITION FOR REHEARING

## ARGUMENT

### POINT I

### THE DECISION OF THIS COURT TO REVERSE THE DECISION OF THE TRIAL COURT IS BASED UPON GROUNDS NOT ARGUED BY EITHER PARTY, AND UPON WHICH RESPONDENT HAS NOT HAD AN OPPORTUNITY TO BE HEARD.

The Appellant argued his case under three points, (1) that the trial court erred in considering the two depositions ( of Mr. Mortensen and Mr. Cosby) in its decision; (2) the trial court erred in granting judgment against Caine for $6,762 with no accounting records, no testimony as to the conclusion reached and no evidence of any type or description as to how the money judgment was determined; and (3) where there is no competent evidence in a law case to warrant the Findings of Fact and Decision, the Supreme Court may interfere and hold the findings and decision void.

**As to Appellant's Point 1:**

Neither Justice Tuckett nor Chief Justice Crockett made any reference thereto. Justice Ellett, in his dissenting opinion, pointed out that the trial court did not err in considering the depositions.

**As to Appellant's Point 2:**

It is true that when Appellant filed his brief the record did not contain "any accounting records nor testimony as to the conclusion reached and no evidence of any type or description as to how the money judgment was determined." However, the trial court certified in its Order for Transmittal of Evidence Omitted from Record on Appeal for Inclusion on Appeal "from the evidence, arguments and affidavits and from the Court's recollection of the proceedings" those matters which answered Appellant's Point 2.

This order recites in part:

> "At said hearing one Jack Fletcher, treasurer and keeper of the financial records of Reliance National Life Insurance Company, was sworn and testified from Plaintiff's records in his possession, reflecting the status of the account between Reliance National Life Insurance Company and James E. Caine. That from said records, the said Jack Fletcher testified that the Defendant James E. Caine was indebted to the Pltintiff Reliance National Life Insurance Company as of the date of said trial in the amount of $6,762.73."

However, Justice Tuckett stated:

> "The Defendant here contends that the findings and judgment of the Court are not supported by the evidence at the trial."

Is it true that the order above quoted does not support the judgment?

Is it not usual for a witness testifying to an account and having the records in his possession to state that he has checked the account as disclosed by the records, and that by so doing determined that A is indebted to B in a certain amount? If the other side does not cross-examine, is the evidence insufficient?

The trial court stated (R. 287):

> "It is clear in my mind as to what took place at the hearing of this matter. Mr. Davis says that John Farr Larsen, that he does not recall cross-examining him, but my recollection is that we had a — he had these books and records here, testified, and after we got through we either had a recess, either for the same day or a future day, to give Mr. Larsen a chance to go into these records. That is my recollection that we had these records here and Mr. Larsen was interested in those records." (R. 286-287)

It may be true that Mr. Larsen did not cross-examine, but he did have Richmond, Jones and Anderson, certified public accountants, prepare an audit report from the records of Reliance dated July 30, 1956, which discloses that Caine owed Respondent approximately the same amount as Fletcher testified to, and the trial court ordered Respondent to pay Richmond, Jones and Anderson $695 for preparing the audit. (R. 166)

Respondent will discuss this audit hereafter.

**As to Appellant's Point 3:**

The opinions of Justices Tuckett and Ellett and Chief Justice Crockett make no reference to this point.

## POINT II.

THE DECISION OF THIS COURT AND THE CONCURRING OPINION OF CHIEF JUSTICE CROCKETT REVERSING THE JUDGMENT OF THE TRIAL COURT ARE BASED, IN PART, UPON A MISUNDERSTANDING OF THE RECORD.

Chief Justice Crockett stated:

> "It (opinion of Justice Tuckett) does not take the position that the judgment is invalid, but simply that on the state of the record it is impossible to tell whether it is valid and sustainable or not . . .
>
> "(1) Where there are essential issues which it is impossible to review properly because of the unsatisfactory state of the record and
>
> "(2) Where this situation appears largely due to the fault of the Plaintiff, I agree that
>
> "(3) the ends of justice will be best served by remanding the case for trial."

Respondent wishes to discuss the above statements (1), (2) and (3).

Justice Tuckett referred to a stipulation in which the parties agreed that before an accounting could be made from the books of the company, it was first necessary that the Court determine certain matters of law relating to the forfeiture provision of the contract, and that a part of the stipulation was:

> "That before the matter can be properly and fully adjudicated, the Court must decide whether the evidence is such as to require a forfiture as described in Paragraph 10 of the agency supervisor's contract."

Justice Tuckett further stated:

> "It would appear that Caine"s contention was that Reliance had breached the contract and that, by reason of the breach, Reliance was barred from declaring a forfeiture.
>
> "(1) Whatever evidence was before the Court respecting this matter is no longer available.
> "It will be noted that the efforts of Court and counsel to supply by affidavit and a certificate a record of testimony which supports the Court's findings and judgment only to go to one issue of fact.
>
> "(2) It appears that there are other issues upon which the Court undoubtedly took testimony and upon which findings should have been made, but that testimony is not here for review."

Justice Tuckett also stated:

> "(3) An important fact in this case is that the long delay in submitting findings and judgment to the Court by the prevailing party contributed to the impossibility of obtaining a transcript of the testimony at the time of appeal."

Respondent desires to discuss the above statements (1), (2) and (3).

Respondent has indicated an intention to discuss Justice Tuckett's statements (1), (2) and (3) and Chief Justice Crockett's statements (1), (2) and (3).

All of said statements relate to this point — misunderstanding of the record. However, Chief Justice Crockett's statement (2) and Justice Tuckett's statement (3) are the subject of Petitioner's Point III and will be

discussed under Point III, leaving Chief Justice Crockett's statements (1) and (3) and Justice Tuckett's statements (1) and (2) to be discussed under this Point II.

**As to Justice Tuckett's Statement (1):**

Justice Tuckett stated:

> "It would appear that Caine's contention was that Reliance had breached the contract and that, by reason of the breach, Reliance was barred from declaring a forfeiture. Whatever evidence was before the Court respecting this matter is no longer available."

No evidence was introduced upon this matter.

Defendant stipulated on November 23, 1960 (R. 29) before the Memorandum Decision was entered on January 5, 1961 (R. 25-26), that if the Court decides that the forfeiture provision should be invoked, "We have no issue of fact." (R. 29)

Defendant stated (R. 29):

> "Would a prior breach by Plaintiff bar the application of the forfeiture provision of the agency supervisor's contract if they were otherwise applicable? Defendant's position. Yes.
> "In substance, Defendant alleges and Plaintiff denies that on several occasions Plaintiff withheld from Defendant certain commissions. If the Court determines this question of law in the affirmative, then we have a question of fact as to whether there was a breach, and Defendant should be permitted to offer his evidence on this point, with Plaintiff permitted to rebut. If the Court decides this question in the negative, we have no issue of fact."

The trial court in the Memorandum Decision stated:

> "That any prior breach by the plaintiff, if any, would not be a bar to the application of the forfeiture provision of the agency supervisor's contract." (R. 25)

Thereafter Defendant did not attempt to put in evidence anything on this matter.

**As to Chief Justice Crockett's statement (1) and Justice Tuckett's Statement (2):**

Chief Justice Crockett stated that in the state of the record it is impossible to tell whether the judgment of the trial court is valid and sustainable or not

> "(1) where there are essential issues which it is impossible to review properly because of the unsatisfactory state of the record."

Justice Tuckett stated:

> "It will be noted that the efforts of Court and counsel to supply by affidavit and a certificate a record of testimony which supports the Court's findings and judgment only go to one issue of fact.
>
> "(2) It appears that there are other issues upon which the Court undoubtedly took testimony and upon which findings should have been made, but that testimony is not here for review."

If there had been such issues and testimony thereon, should not the Defendant have made an effort to supply the record thereon? (Rule 75 (m) Rules of Civil Procedure).

There were only three other issues. Upon these, two were issues upon which findings were made (the forfeiture problem and the duty to account question). The third issue (the bonus commission) is of little importance and is included in the issue of the amount owing by Defendant.

A careful consideration of Defendant's Statement of the Case dated November 23, 1960 (R. 27-32) will disclose that Defendant did not introduce evidence upon any other issue than those plainly before the Court in the record. Defendant in said Statement of the Case fully discussed these issues. He stated (R. 28):

> "However, it has been apparent to both parties that the matter cannot be properly disposed of until the Court determines certain questions of law and fact. With these matters determined, the controversy should be easily solved.
> "Matters to be Determined:
> "The basis question in this lawsuit is to determine the status of the account between the parties, i.e., who owes who and how much.
> "The account between the parties cannot be ascertained until certain other matters are determined by the Court. These matters revolve around (1) The Bonus Comimssion, (2) The Forfeiture Problem, (3) The Duty to Account Question."

It will be noted that in Defendant's Statement of the Case of November 23, 1963, reference is not made to any other issues (R. 27, 32).

As to (1), the Bonus Commission, Richmond and Jones calculated in its audit report of July 30, 1960,

the bonus commission to be $645.32 for the period of February 1, 1956 to December 31, 1956. Defendant terminated his contract as of August 20, 1956 and would not be entitled to receive bonus commission thereafter. Thus, the bonus commission should be calculated only from February 1, 1956 to August 20, 1956. Upon a pro rata basis (seven of the twelve months, February through August) this commission would be $376.39

Respondent admits that Appellant is entitled to bonus commission from February 1, 1956 to August 20, 1956 — $376.39.

As to (2), the Forfeiture Problem, this has been discussed above under Justice Tuckett's statement (1).

The Memorandum Decision included:

> "The evidence indicates clearly that the forfeiture provision should be applied."

It was applied in the Findings, Conclusions and Judgment (R. 47-52).

As to (3), the Duty to Account, Appellant argues (R. 31):

> "May an insurance company having a duty to account . . . which fails or refuses to provide an accounting . . . and as a result such employee is required to have the account audited . . . be required to pay the costs of such audit?"

The Court ordered the Respondent to pay the accountants $675.00 for their services and the judgment so provides.

**As to Chief Justice Crockett's statement (3): Chief Justice Crockett stated:**

> "I agree that the ends of justice will be best served by remanding the case for trial."

The audit introduced by the Appellant, together with the fact that Caine resigned on August 20, 1956 (Ex. D-3), discloses that Defendant is indebted to Respondent in the approximate amount of Respondent's judgment, $6,762.73. Richmond, Jones and Anderson, CPA's (hereinafter referred to as R J & A) employed by Appellant, submitted the audit report dated July 30, 1960, two days before the hearing of August 1, 1960, of which we have a transcript. On the last page of the transcript appears a question by the Court concerning the reasonableness of $695.00 charged for the audit. That is the amount the judgment provides that Respondent pay to R J & A. During the hearing of January 11, 1968, counsel for Respondent stated:

> "Richmond and Jones did submit an audit."

to which the Court answered:

> "Right". (R. 29)

Appellant in his Statement of the Case, stated (R. 27):

> "The books were audited by Richmond, Jones and Anderson."

and at R-31 stated:

> "Plaintiff failed to provide Defendant with an accounting and as a result Defendant was required to have an audit made."

This audit discloses:

Credits for commissions earned by Caine (Exhibit 1):

| | |
|---|---|
| February | $ 558.88 |
| March | 1,422.86 |
| April | 19,643.12 |
| May | 2,846.69 |
| June | 3,052.41 |
| July | 4,032.60 |
| August | 3,643.21 |
| September | 4,426.11 |
| October | 2,677.16 |
| November | 1,628.50 |
| December | 3,825.71 |
| 1957 | |
| January | 800.62 |
| Total commissions earned by Caine | $48,567.87 |

Credits to Caine (Exhibit A):

| | |
|---|---|
| Commissions earned (as above) | $48,567.87 |
| Director's fee | 10.00 |
| Bonus | 645.34 |
| Overwrite premiums not account for | 1,987.75 |
| Total credits to Caine shown by audit | $51,210.96 |

These credits include commissions earned, bonuses and overwrite premiums credited to Caine after his resignation on August 20, 1956.

Charges against Caine (Exhibit A):

| | |
|---|---|
| Advances to agents | $15,866.89 |
| Advances to James E. Caine | 14,850.00 |
| Telephone calls | 169.68 |
| United Airlines | 258.24 |
| Plans, Hennings, Draper, etc | 356.38 |
| Legal, Fabian Clendenin, etc. | 1,560.00 |
| Advertising | 118.68 |
| Travel | 1,596.72 |
| Returned checks — commercial chargebacks | 349.69 |
| Commissions retained | 550.52 |
| Agents balances charged to J. E. Caine | 2,962.89 |
| Totals charges | $43,581.69 |

Deductions for commissions earned, bonus, and overwrite premiums credited to Caine after he resigned:

| | |
|---|---|
| Commissions earned: | |
| September | $ 4,426.11 |
| October | 2,677.16 |
| November | 1,628.50 |
| December | 3,825.71 |
| 1957 | |
| January | 800.62 |
| Bonuses (5/12 of $645.32 for months of September to January, inclusive.. | 268.90 |
| Overwrite premiums (5/12 of $1,987.75 for months of September to January, inclusive) | 828.30 |
| | $14,455.30 |

| | | |
|---|---|---|
| Total charges against Caine (Exhibit A) | | $43,581.69 |
| Deductions for commissions, bonus, and overwrite credited to Caine after he resigned | | 14,455.30 |
| Total charges against Caine | | $58,036.99 |
| Total charges and deductions against Caine (See next above) | | $58,036.99 |
| Total credits to Caine (see above) | | $51,210.96 |
| Net owing by Caine to Respondent | | $ 6,826.03 |
| Net owing by Caine as per audit | | $ 6,826.03 |
| Judgment entered against Caine | | 6,762.73 |
| Difference between audit and judgment | | $ 63.30 |

As stated above, the audit discloses approximately the same amount due to Respondent as the judgment entered in its favor.

Respondent submits that the ends of justice will not be best served by requiring a retrial when the Defendant's evidence discloses that Defendant is indebted to Plaintiff in approximately the same amount as judgment. This is particularly true when it is now nearly eight years since this case was tried. The witnesses are scattered, Respondent has passed through a corporate merger, and it is most unlikely that the books and records can again be produced which were produced at the hearing in 1960. In any event, it will cast a very heavy burden of effort and a heavy expenditure of money upon the Plaintiff to retry the case, with the probability that the Plaintiff will be unable to furnish the evidence again.

## POINT III

THE DECISION OF THIS COURT AND THE CONCURRING OPINION OF CHIEF JUSTICE CROCKETT PLACES THE BLAME UPON THE RESPONDENT FOR THE LONG DELAY IN SUBMITTING FINDINGS AND JUDGMENT TO THE TRIAL COURT, WHICH BLAME APPEARS TO HAVE INFLUENCED THE MAJORITY DECISION. THE RECORD DOES NOT SUPPORT PLACING THE BLAME UPON THE RESPONDENT.

In the decision of the Court written by Justice Tuckett, he states:

> "An important fact in this case is that the long delay in submitting findings and judgment to the Court by the prevailing party contributed to the impossibility of obtaining a transcript of the testimony at the time of the appeal."

In the concurring opinion of Chief Justice Crockett, he states:

> "Due to the particular fact situation in this case where there have been a number of hearings over a period of about seven years before the judgment was entered; where there are essential issues which it is *impossible to review properly because of the unsatisfactory state of the record; and where the situation appears to be largely due to the fault of Plaintiff,* I agree that the ends of justice will be best served by remanding the case for trial."

Respondent admits that ordinarily a delay in preparing and submitting Findings of Fact and Conclusions of Law and Judgment to the trial court after the rendition of a Memorandum Decision would be the fault of

counsel for the party in whose favor the Memorandum Decision was rendered. However, in this case the Findings, Conclusions, and Judgment were not submitted to the trial court for signature because immediately after the rendition of the Memorandum Decision counsel for the Appellant requested further hearing, which was granted, and over a very extended period of time he failed to bring the matter to a hearing, although the case was set down for further hearing on several occasions. As the trial court stated, as set out in the transcript of the hearing on January 11, 1968, at page 12 of that transcript (R. 292):

> The Court: "And then after this memorandum decision was rendered, I sat this matter for further hearing at the request of John Farr Larsen at least fifteen times, and every time we would get ready it was called off, and finally I thought the matter was settled or I would have still had my notes, but I threw those away a year ago last summer."

Counsel for the Respondent admits that he was lenient with the Defendant in attempting to give the Defendant an opportunity to be further heard if he cared to be heard, and realizing that the Defendant, during part of the time at least, was in the State of Washington not free to appear for a hearing in Salt Lake City.

Counsel for the Respondent has never objected to any attempt of the Defendant to have further hearing. As late as Aprill 22, 1967, present counsel for the Appellant filed the following motion (R. 45-46):

"Defendant moves the Court for an order granting one or more of the following requests as follows:

"(1) That this case be reopened and a trial date be granted to complete the unfinished matters remaining before the Court on August 1, 1960, with both parties having leave to amend their pleadings, or

"(2) That Defendant's attorney, Merrill K. Davis, be granted leave to prepare the Findings of Fact, Conclusions of Law and Judgment and to submit the same to the Court within twenty days from the date that this motion is heard."

The Respondent filed no objection to the motion to reopen and set a trial date to complete any matters which the Defendant cared to introduce, but when counsel for the Defendant moved the Court for an order granting him leave to prepare Findings, Conclusions and Judgment, the Respondent submitted Findings, Conclusions and Judgment, because Respondent's counsel was better informed as to the case and in a better position to file such than counsel for the Appellant.

Thus, from immediately after the filing of the Memorandum Decision until April 24, 1967, the Defendant has been free to submit any matters to the Court which he cared to do, and no objection of any kind thereto has been entered by the Respondent.

## CONCLUSION

Respondent submits that justice will best be served by sustaining the decision of the lower court.

Such action would certainly be consistent with the prior decisions of this court in the following cases: *Erickson vs. McCullough,* 91 Utah 159, 63 P. 2d 595; *Baine vs. Beckstead,* 10 Utah 2d 4, 347 P. 2d 554; *Johnson vs. Peoples Finance and Thrift Company,* 2 Utah 2d 246, 272 P. 2d 171; and *Wilkins vs. Simond,* 14 Utah 2d 406, 385 P. 2d 154.

Respectfully submitted,

MOFFAT, IVERSON AND TAYLOR

By .....
J. Grant Iverson
*Attorneys for Respondent*